The Editorial Function and the *Gertz* Public Figure Standard

The extent of protection afforded by the First Amendment has expanded greatly during the last three decades,[1] and the institutional press[2] has benefited from this expansion.[3] Also during this period the states have increased the protection afforded individual privacy,[4] including individual reputation.[5] These expanding notions of free press and privacy often clash, and their conflict is most evident in the area of defamation. Although the Supreme Court has held that defamation, because it is false speech, is not protected by the First Amendment, the cases limit the scope of state libel laws in various ways in order that the press[6] will not be inhibited from publishing or broadcasting

1. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech); Buckley v. Valeo, 424 U.S. 1 (1976) (political contributions); Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969) (symbolic speech); Cox v. Louisiana, 379 U.S. 559 (1965) (parades).

2. This Note is based on certain generalizations concerning the activities of the institutional press that may not apply to all mass media outlets. *See* p. 1735 (discussing press selection and packaging of information); *cf.* Curtis, *Responsibility for Raising Standards*, in THE RESPONSIBILITY OF THE PRESS 95 (G. Gross ed. 1966) (there are thousands of individual press outlets).

3. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (editorial function serves First Amendment); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (prior restraint cannot prevent publication of stolen documents procured by press).

4. Although the tort of invasion of privacy, like that of libel, can potentially inhibit individual expression, the Supreme Court has held that it serves a legitimate state interest. *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 579 (1977) (state protection afforded individuals through privacy tort does not violate First Amendment); *cf.* Roe v. Wade, 410 U.S. 113, 152-55 (1973) (constitutional right to privacy implicated in woman's decision to have abortion); Katz v. United States, 389 U.S. 347, 353 (1967) (Fourth Amendment privacy right forbids electronic surveillance even without physical intrusion).

5. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971) (plurality opinion) (law of defamation designed to enable individual "to preserve a certain privacy around his personality"); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (law of defamation reflects "our basic concept of the essential dignity and worth of every human being").

6. Although New York Times Co. v. Sullivan, 376 U.S. 254 (1964), dealt with both media and nonmedia defendants, the Court showed specific concern for the institutional press, such as daily newspapers, broadcasters and news magazines. *Id.* at 278 (recognizing that "pall of fear and timidity imposed" on press by threat of large judgments will lead to unacceptable self-censorship). Moreover, it has been suggested that the liability rule announced in Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-48 (1974), is designed to apply only when the defendant is part of the institutional press. *Compare* Calero v. Del Chem. Corp., 68 Wis. 2d 487, 500, 228 N.W.2d 737, 745 (1975) (*Gertz* does not apply to nonmedia defendants) *and* Note, *First Amendment Protection Against Libel Actions: Dis-*

expression that does fall within the scope of First Amendment guarantees. The Court has attempted, through a process of definitional balancing,[7] to construct liability rules that accommodate this First Amendment need with the states' legitimate interest in protecting individual reputation.[8]

tinguishing Media and Non-Media Defendants, 47 S. CAL. L. REV. 902 (1974) (arguing that *Gertz* applies only to media defendants) *with* Jacron Sales Co. v. Sindorf, 276 Md. 580, 584, 350 A.2d 688, 695 (1976) (*Gertz* standard applied to nonmedia defendant) *and* RESTATEMENT (SECOND) OF TORTS § 580B, Comment e (1976) (applying *Gertz* to all defamation actions regardless of status of defendant). Because most libel actions are brought against the institutional press and because the press is thus subject to large libel judgments on a fairly regular basis, this Note focuses on the relationship of the law of defamation to the activities of the institutional press protected by the First Amendment.

This Note does not argue that the press is protected to a greater extent than individuals; rather it simply observes that the press is protected when it performs functions serving the First Amendment. Similarly, this Note does not contend that the press receives special institutional protection under the press clause, as has recently been suggested. *See generally* Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977); Nimmer, *Introduction—Is Freedom of the Press A Redundancy: What Does it Add to Freedom of Speech?* 26 HASTINGS L.J. 639 (1975); Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631 (1975). There are several difficulties with the latter approach. First, the history of the amendment indicates the Framers probably did not intend a differentiation between "speech" and "press." Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 34-35 (1947). Second, the current role of the press may be a fleeting historical phenomenon that should not be frozen in the First Amendment. *Cf.* Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. REV. 77, 106 (1975) (discussing how role of press has changed over time). Third, there are seemingly insurmountable obstacles involved in constructing an accurate yet flexible definition of "press." *See id.* (arguing that definition based on wide dissemination would exclude pamphleteer, whom "the Framers themselves would have recognized" as member of press). Fourth, separate press clause recognition might dilute the protection afforded nonpress "speech," which performs the same constitutionally favored functions. Above all, the constitutionally protected activities of the institutional press, if recognized, can be safeguarded adequately under the First Amendment itself.

7. *See generally* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1434-35 (1962) (although ad hoc balancing does not protect First Amendment rights adequately, courts should weigh competing interests in devising rule to be applied in future cases); Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 944-45 (1968) (unlike balancing on case-by-case basis, rule based on definitional balancing "can be employed in future cases without the occasion for further weighing of interests"); *cf.* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (Court "categorizes" in solving numerous First Amendment problems).

Because the Court has held that defamation is not "speech" within the meaning of the First Amendment, see p. 1726 *infra*, it has engaged in definitional balancing of competing interests. This Note does not suggest that the level of protection afforded to First Amendment "speech" should be based on definitional balancing.

8. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) ("Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.")

For recent judicial discussion highlighting the tension between privacy and press, see Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 493-95 (1975) (broadcasting name of rape victim). *Cf.* Note, *Government Control of Richard Nixon's Presidential Material*, 87 YALE L.J. 1601, 1606-10 (1978) (competing interests in Nixon papers). *See also* Nixon v. Warner Communications, Inc., 98 S. Ct. 1306 (press-privacy tension present in decision limiting access to Nixon tapes).

After achieving near unanimity in *New York Times Co. v. Sullivan*,[9] the Court was unable to reach a consensus in its subsequent attempts to reconcile these competing interests. In *Gertz v. Robert Welch, Inc.*,[10] however, five Justices agreed on new liability rules that promised to accommodate press and privacy concerns, primarily through creation of a "public figure" standard.[11] The public figure standard was designed to grant increased protection to the institutional press by limiting the power of the states to use libel judgments to vindicate the individual reputations of the class of people defined as public figures. This limitation was based on the premise that the states do not have a substantial interest in protecting these people from defamation.[12]

This Note contends that the public figure standard threatens the very editorial process it seeks to protect and has resulted in a serious intrusion into the daily activities of journalists.[13] First Amendment protection of this editorial function requires a restructuring of the public figure standard adopted in *Gertz*.

I. Development of the Constitutional Standard: From *New York Times* to *Gertz*

The history of the Court's attempt to accommodate the First Amendment with the state interests underlying defamation law is directly relevant to an analysis of the *Gertz* standard. Elements of the public figure standard have their genesis in earlier cases, and the alternative doctrinal approaches apparent in these early cases facilitate understanding of the Court's conception of the competing interests involved.

A. New York Times: *The Common Ground for Public Officials*

In *New York Times* the Supreme Court reversed a state court judgment awarding damages to a public official who claimed injury due to statements, some of them false, in a paid advertisement.[14] The Court formulated several First Amendment principles that have been

9. 376 U.S. 254 (1964). Justices Black and Douglas consistently advanced an absolutist approach by arguing that the law of defamation is unconstitutional in its entirety. *See, e.g., id.* at 293 (Black, J., concurring). That approach has never received the support of other Justices and this Note will not consider it.

10. 418 U.S. 323 (1974).

11. *Id.* at 345. *See* p. 1733 *infra*.

12. *See* pp. 1733-34 *infra* (discussing *Gertz* assessment of legitimate state interest in individual reputation).

13. *See* pp. 1739-43 *infra* (discussing *Gertz*' interference with editorial process).

14. New York Times Co. v. Sullivan, 376 U.S. 254, 261-62 (1964).

used in subsequent attempts by the Court to reconcile First Amendment and state interests.

New York Times acknowledged that defamation does not come within First Amendment protection for expression.[15] The Court held, however, that some defamatory statements must be given constitutional protection to ensure that protected expression is not inhibited.[16]

Rather than vary this First Amendment protection with the individual plaintiff's need for state protection in each case, the Court engaged in definitional balancing and formulated a liability rule designed to indicate the degree of protection to be afforded defamation in future cases. The Justices defined the First Amendment interest by examining the functions served by speech and press activity. The Court concluded that First Amendment activity is favored to the extent it facilitates "debate on public issues"[17] because, as the next major defamation case after *New York Times* explained, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[18] This functional analysis of expression emphasized that the First Amendment facilitates self-government by assuring a free flow of information with which the citizen can make informed political choices. In attempting to reflect this First Amendment interest in its constitutional analysis, the Court argued that the Constitution embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[19]

15. *Id.* at 268; *accord,* Roth v. United States, 354 U.S. 476, 486-87 (1957) (dictum); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (dictum).

16. 376 U.S. at 271-72 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)). In *New York Times,* the Court determined for the first time that defamatory speech should be given some constitutional protection in order to afford "breathing space" to First Amendment speech. 376 U.S. at 271-72.

17. *Id.* at 270.

18. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1965). The *New York Times* Court derived this "central meaning" of the First Amendment, 376 U.S. at 273, from earlier precedents. *Id.* at 269 (citing Roth v. United States, 354 U.S. 476, 484 (1957) (First Amendment designed to facilitate discussion aimed at bringing about "political and social changes desired by the people"), and Stromberg v. California, 283 U.S. 359, 369 (1931) (First Amendment designed to maintain "free political discussion to the end that government may be responsive to the will of the people")).

19. 376 U.S. at 270. The Court's reasoning is supported by many scholarly discussions. *See, e.g.,* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39-45 (1969) (structure of Constitution indicates First Amendment designed to facilitate self-government); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948) (First Amendment "a deduction from the basic American agreement that public issues shall be decided by universal suffrage"); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 23 (1971) (self-government requires free political speech). Commentary on *New York Times* has recognized that express judicial adoption of this First Amendment analysis is the major constitutional contribution of the case.

New York Times made another contribution to defamation law because its functional approach led to a requirement that a specific category of persons prove a constitutionally mandated level of culpable conduct in order to recover damages. The Court recognized that a citizen's ability to criticize governmental officials without fear of state punishment facilitates self-government and analogized the chilling effect[20] of punishment for defamation of a public official to conviction for seditious libel.[21] Accordingly, the decision denied recovery to public officials for defamation, except when they could prove " 'actual malice' " defined as "knowing falsehood" or "reckless disregard" of the truth.[22] The *New York Times* majority left intact the dominant common law standard of strict liability and presumed damages when the plaintiff was not a public official.[23]

B. Butts *and* Rosenbloom: *Alternative Approaches to Nonofficials*

Because both the functional analysis and the actual malice standard of *New York Times* were intended to protect the First Amendment interest in criticism of government, the decision did not define the extent of protection for defamatory speech required when governmental officials are not involved.[24] The Court turned to this task in cases following *New York Times*. Although the Justices agreed that the *New York Times* analysis, which focused on the function of protected expression, was applicable to other cases, they could not agree on the proper First Amendment standard to be applied to nonofficials.

See, e.g., Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 193-94; *cf.* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 14-20 (1965) (discussing relevance of Meiklejohn theory to *New York Times* analysis).

20. *See* 376 U.S. at 279 (critics of official action may be "deterred").

21. *Id.* at 276. The Court reasoned that a defamation action brought by a public official is almost indistinguishable from a seditious libel prosecution for criticism of that official's performance. The unconstitutionality of both forms of punishment "is the lesson to be drawn from the great controversy over the Sedition Act of 1798." *Id.* at 273; *see* Kalven, *supra* note 19, at 205 (emphasizing implications of Court's seditious libel analogy for future First Amendment analysis).

22. 376 U.S. at 280; *see* St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968) (interpreting "reckless disregard" to require finding that press "in fact entertained serious doubts as to the truth" of published material).

23. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 772 (4th ed. 1971) (post-*New York Times* review of common law libel). To lessen the effect of these often harsh rules, a series of conditional privileges evolved, most notably the fair comment and public record privileges. For extended discussion of the common law privileges, see W. PROSSER, *supra*, § 115, at 792; Note, *supra* note 6, at 905-12. Prior to *New York Times*, these conditional privileges were largely ineffective as protections for the press and therefore newspapers often found it necessary to engage in self-censorship. Z. CHAFEE, *supra* note 6, at 100-01.

24. *See* 376 U.S. at 301 (Goldberg, J., concurring in result) ("Purely private defamation has little to do with the political ends of a self-governing society. . . .")

In *Curtis Publishing Co. v. Butts*,[25] the Court affirmed a judgment in favor of a university athletic director who had been accused by the *Saturday Evening Post* of conspiring to fix a football game.[26] In a companion case, *Associated Press v. Walker*,[27] the Court held that the First Amendment protected the Associated Press from liability for printing a partially inaccurate article reporting that a retired army general had taken command of a violent crowd opposing integration.[28] In a later decision, *Rosenbloom v. Metromedia, Inc.*,[29] the Court ruled in favor of a radio station that had referred to a bookseller as a "girlie book peddler" and a "distributor of obscene material" following his arrest on criminal obscenity charges, of which he was eventually acquitted.[30]

The three approaches that emerged in these cases shared the view that the emphasis in *New York Times* on the function of First Amendment activity should be extended to cases involving defamation of nonofficials. The opinions in all three cases recognized a First Amendment interest in the activities of the institutional press and emphasized the benefit that a self-governing society derives from uninhibited press dissemination of opinion and information.[31] According to Justice Harlan's plurality opinion in *Butts*, the law of defamation, to meet First Amendment requirements, "must neither affect 'the impartial distribution of news' . . . nor . . . constitute a special burden on the press . . . nor deprive our free society of the stimulating benefit

25. 388 U.S. 130 (1967).

26. *Id.* at 135. Although Butts was athletic director at a state university, the Court did not consider him a public official because he was employed by a private organization of alumni. *Id.*

The Court had previously dealt with a defamation action in which plaintiff was not a public official in Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966). That case, however, was decided under a provision of the National Labor Relations Act, 29 U.S.C. § 158(c) (1970), that was intended to ensure protection of First Amendment rights in labor disputes, 383 U.S. at 62. The Court held that because of the unique qualities of union elections, Congress intended the "actual malice" standard to apply to defamation in labor disputes. *Id.* at 62-63.

27. 388 U.S. 130 n.* (1967).

28. *Id.* at 140-42.

29. 403 U.S. 29 (1971).

30. *Id.* at 32, 33-35.

31. *Id.* at 43-44 (plurality opinion of Brennan, J.) (First Amendment protects all information of "public or general concern"); Curtis Publishing Co. v. Butts, 388 U.S. 130, 147 (1967) (plurality opinion of Harlan, J.) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)) (First Amendment "'must embrace all issues about which information is needed'" so that individuals can "'cope with the exigencies of their period'"); *cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("Without the information provided by the press most of us . . . would be unable to vote intelligently or to register opinions on the administration of government generally."); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (dictum) (First Amendment "not for the benefit of the press so much as for the benefit of all of us" because free press needed to assure "maintenance of our political system and an open society").

of varied ideas."[32] The Justices disagreed, however, about the requisite level of First Amendment protection when the plaintiff is not a public official. Two alternative approaches emerge from *Butts*. Both the approach Justice Harlan offered in his plurality opinion[33] and the approach Chief Justice Warren advanced in his concurrence[34] created "public figure" standards designed to complement the public official category of *New York Times*.

The Harlan approach specifically opposed expansion of the seditious libel rationale to the new public figure category, because a private defamation action by a plaintiff who is not a governmental official does not represent an attempt to suppress criticism of government.[35] Justice Harlan struck a new balance of competing interests. Although he argued that the First Amendment interest remains constant in all defamation cases,[36] Justice Harlan contended that the legitimacy of the state's interest in protecting an individual's reputation varies according to how much the plaintiff needs and deserves such protection. Individual need depends on actual conduct[37] since the state interest diminishes either when the plaintiff has "sufficient access to the means of counterargument"[38] or when he has assumed

32. Curtis Publishing Co. v. Butts, 388 U.S. 130, 150-51 (1967) (plurality opinion) (quoting Associated Press v. Labor Bd., 301 U.S. 103, 133 (1937)) (other citation omitted). In *Butts* and *Walker*, the Court concentrated on the needs of the institutional press, 388 U.S. at 150-51; *id.* at 164 (Warren, C.J., concurring in result) ("freedom of the press to engage in uninhibited debate" is "crucial" to informing citizens about conduct of public figures); *cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51 (1971) (plurality opinion of Brennan, J.) (arguing society is "dependent . . . for its survival upon a vigorous free press").

33. Three Justices agreed with Justice Harlan that a variant of a "gross negligence" standard should apply to actions brought by public figures. 388 U.S. at 155. Chief Justice Warren concurred in the result, basing his decision on the actual malice standard. *Id.* at 165, 170 (concurring opinion). Because Justices Brennan and White agreed with Warren that the actual malice standard applied and Justices Black and Douglas reiterated their absolutist position, the actual malice standard, rather than Harlan's standard, determined the outcome. For an illuminating attempt to sort out the various opinions in *Butts*, see Kalven, *The Reasonable Man and the First Amendment:* Hill, Butts *and* Walker, 1967 SUP. CT. REV. 267, 275-78.

34. Curtis Publishing Co. v. Butts, 388 U.S. 130, 167 (1967) (Warren, C.J., concurring in result).

35. *Id.* at 153 (plurality opinion of Harlan, J.) ("In *New York Times* we were adjudicating in an area which lay close to seditious libel."); *id.* at 154 ("These actions cannot be analogized to prosecutions for seditious libel."); *see* Kalven, *supra* note 33, at 282 (seditious libel rationale not relevant).

36. *See* pp. 1728-29 and notes 31 & 32 *supra* (constant First Amendment interest in institutional press). Justice Harlan's definition of a public figure retreated from this view, however, by requiring that a press report concern a judicially determined "public controversy" in order to receive First Amendment protection. 388 U.S. at 155 (plurality opinion of Harlan, J.).

37. *Id.* at 154 (public figure category necessary "to determine whether [plaintiff] has a legitimate call on the court for protection in light of his prior activities and means of self-defense").

38. *Id.* at 155.

the risk of defamation by "thrusting . . . his personality into the 'vortex' of an important public controversy."[39] The Harlan approach would classify a plaintiff meeting either of these conditions as a "public figure," and would hold the press liable only for breach of a standard of care much like gross negligence whenever such a plaintiff brought a defamation suit.[40]

By contrast, Chief Justice Warren concluded that the actual malice standard of *New York Times* must apply to public figures as well as to public officials. The Chief Justice carried the *New York Times* seditious libel rationale an additional step and argued that large private concentrations of political and economic power cause "individuals . . . who do not hold public office at the moment" to be "ultimately involved in the resolution of important public questions."[41] Thus the Warren approach would define a public figure by his status as an individual whose societal influence approaches that of a public official.[42]

The *Rosenbloom* approach, stated for a plurality of three by Justice Brennan,[43] rejected both the Harlan and Warren public figure standards. The plurality specifically repudiated Justice Harlan's contention that the state interest varies with the category of plaintiff[44] and further insisted that "a distinction between 'public' and 'private' figures makes no sense"[45] as a device to resolve First Amendment issues. In addition, Justice Brennan rejected Chief Justice Warren's

39. *Id.* Justice Harlan's separate opinion in Time, Inc. v. Hill, 385 U.S. 374 (1967), elucidated his reasons for believing private individuals are entitled to greater state protection than public figures. "It would be unreasonable to assume" that a private individual "could find a forum for making a successful refutation" of defamatory statements. *Id.* at 407-08. A private individual comes "to public attention through an unfortunate circumstance not of his making" and "can in no sense be considered to have 'waived' any protection the State might justifiably afford him." *Id.* at 409. The adoption of this premise for retaining the public figure standard in *Gertz* is described at p. 1733 *infra*.

40. 388 U.S. at 155 (plurality opinion of Harlan, J.).

41. *Id.* at 163-64 (Warren, C.J., concurring in result). Compare pp. 1729-30 & note 37 *supra* (Justice Harlan's public figure category focused on plaintiff's activity as opposed to his status).

42. Neither the Harlan nor the Warren approach limits First Amendment protection to publication of expressly political information. *Butts* dealt with the nonpolitical subject of college football. For examples of cases protecting press dissemination of both political and nonpolitical information outside the field of defamation, see Bigelow v. Virginia, 421 U.S. 809, 829 (1975) (state law prohibiting newspaper dissemination of abortion advertising unconstitutional); Mills v. Alabama, 384 U.S. 214, 218-20 (1966) (state law limiting newspapers' ability to endorse political candidates unconstitutional).

43. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). There was no opinion of the Court. Justice Brennan spoke for himself, Chief Justice Burger and Justice Blackmun. *Id.* at 30. Justices Black and White concurred in the result only. *Id.* at 57.

44. *Id.* at 46 (asserting public official standard did not reflect determination that "public official has any less interest in protecting his reputation than an individual in private life").

45. *Id.* at 45-46.

approach, which predicated constitutional protection on the status of the particular plaintiff, as an impermissibly narrow definition of the First Amendment interest.[46] Regardless of the conduct or character of the plaintiff, the *Rosenbloom* approach concluded that the First Amendment required application of the actual malice standard of the *New York Times* case whenever a matter of "public or general interest"[47] is involved.

C. *The* Gertz *Standard: A New Category for Public Figures*

The failure of the *Rosenbloom* Court to reach a majority decision created a dilemma for lower courts confronted with three alternative statements of the constitutionally required standard for adjudicating defamation claims.[48] The resulting confusion led the Court in *Gertz v. Robert Welch, Inc.*[49] to attempt to formulate a new standard—one that blended elements of all three prior approaches. In that case the plaintiff, an attorney, had been retained by the parents of a youth allegedly killed by a policeman to bring a civil action against the accused policeman. In investigating an alleged plot to undermine police authority, a John Birch Society magazine, without attempting to check the truth of the claims being made, published a contributed article that falsely identified Gertz as a " 'Communist-fronter' " and a " 'Leninist.' "[50] The Supreme Court reversed a ruling for the magazine based on both the *Rosenbloom* "public interest" and Warren "public figure" standards.[51] Announcing a new constitutional standard,[52] it held that Gertz was not a public figure.

46. *Id.* at 43. ("The public's primary interest is in the event . . . .")

47. *Id.*

48. Several courts, including the court of appeals in *Rosenbloom*, had anticipated the plurality opinion by adopting a "public interest" test in order to determine when the actual malice standard applied. *See, e.g.*, Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 862 (5th Cir. 1970); Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 896 (3d Cir. 1969), *aff'd*, 403 U.S. 29 (1971); United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706, 711 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *cf.* Note, *The Scope of First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L.J. 642, 644-45 (1966) (arguing Court should adopt "public interest" standard). Even after *Rosenbloom*, several lower courts continued to apply some variant of the public figure standard. *See, e.g.*, Gibson v. Maloney, 263 So. 2d 632, 635 (Fla. Dist. Ct. App. 1972), *cert. denied*, 410 U.S. 984 (1973) (newspaper publisher is public figure).

49. 418 U.S. 323 (1974).

50. *Id.* at 326.

51. *Id.* at 328-32; *see* Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974). The district court had determined initially that the actual malice standard did not apply to a private individual, but later set aside the jury's verdict under application of a "public interest" standard. Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

52. 418 U.S. at 343-48.

Although the media defendant was held liable, *Gertz* extended First Amendment protection beyond the limits of prior cases. The Court made explicit the premise of all three post-*New York Times* approaches that the activities of the institutional press deserve some minimum level of protection from the threat of libel judgments.[53] *Gertz* rejected the common law practices of strict liability and of presumed damages.[54] The Court adopted a fault standard as the minimum level of culpable conduct in all actions against the press[55] and limited damage awards to compensation for "actual injury"[56] in most cases in order to reduce their chilling effect on press activity.[57] *Gertz*, like *New York Times*, recognized that the chilling effect produced by fear of large damage awards may induce the press to avoid potential liability and that, therefore, some protection of defamatory speech is necessary to prevent the inhibition of protected press activity.[58]

The Court, however, rejected *Rosenbloom*'s assertion that the category of plaintiff is irrelevant and embraced instead a refinement of

53. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974) (finding strict liability and presumed damages inconsistent with press freedom "grounded in the constitutional command of the First Amendment").

54. *See* note 23 *supra* (discussing common law doctrine).

55. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974). The fault requirement protects press dissemination of information and opinion by vindicating the press in all cases where the statement does not make "substantial danger to reputation apparent." *Id.* at 348 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion of Harlan, J.)). It thus focuses a court's attention on objective press conduct rather than on the content of published material, *see* pp. 1739-43 *infra*, and presumably defines fault as press activity inconsistent with accepted standards of quality journalism. *See* 418 U.S. at 348 (implying press not negligent when published information "did not warn a reasonably prudent editor or broadcaster of its defamatory potential").

Although the Court did not explicitly advocate the fault standard, it held that states must not "impose liability without fault" as they "define for themselves the appropriate standard of liability." *Id.* at 347. Several states considering the question have adopted a fault standard. *See, e.g.*, Troman v. Wood, 62 Ill. 2d 184, 198, 340 N.E.2d 292, 299 (1975); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 168-69 (Mass. 1975). Several states have adopted either a "gross negligence" standard or some other modified version of *Rosenbloom*. *See, e.g.*, Walker v. Colorado Springs Sun, Inc., 538 P.2d 450, 457-58 (Colo.), *cert. denied*, 423 U.S. 1025 (1975); Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975). It appears that some jurisdictions have adopted the actual malice standard without modification. *See, e.g.*, Hatter v. Evening Star Newspaper Co., No. CA 8298-75, slip op. at 2 (D.C. Sup. Ct. Mar. 15, 1976); AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580, 586-87 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976). Although a state clearly has the power to adopt an "actual malice" or "gross negligence" standard for all defamation actions, it is questionable whether a state is permitted to differentiate between matters of public and nonpublic interest in applying that standard in light of *Gertz*. *See* pp. 1733-34 *infra*.

56. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974).

57. *Id.* at 349 ("[T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury.") *But see* note 122 *infra* (assessing success of actual injury standard).

58. 418 U.S. at 340 ("[P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.")

the public figure category advanced in the Harlan and Warren approaches. The *Gertz* Court incorporated *both* alternative definitions from *Butts* into one public figure standard.[59] The first branch of the *Gertz* public figure standard, derived from the Warren approach, includes those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[60] The second branch of the standard, based on the Harlan approach, encompasses those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[61] Under *Gertz,* a public figure, so defined, must show actual malice in order to recover damages.

Although *Gertz* adopted both definitions, it premised the need for a public figure category solely on Justice Harlan's concept of a fluctuating level of legitimate state interest in reputation[62] rather than on Chief Justice Warren's expansion of the seditious libel rationale. The Court accepted Harlan's premise that the state interest diminishes when the plaintiff is a public figure.[63] First, public figures have access to media, which afford them "self-help" to "contradict the lie or correct the error and thereby minimize its adverse impact on reputation."[64] In addition, public figures "invite attention and comment"[65] and thereby assume the risk of press scrutiny.[66] The "private person," however, "has relinquished no part of his interest in the protection of his own good name"[67] and is "not only more vulnerable to injury"[68] but also "more deserving of recovery."[69] For this reason, *Gertz* concluded that application of the *Rosenbloom* "public interest" standard to private persons as well as to public figures "would abridge this legitimate state interest to a degree that we find unacceptable."[70]

59. The Court also asserted that certain individuals are public figures "through no purposeful action" of their own, although it conceded "the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 345.

60. *Id.* Although *Gertz* seems to suggest that these individuals are likely to have access to self-help remedies, *id.* at 344, the definition requires inquiry into the public figure's "power" and "influence" rather than his ability to mitigate damages.

61. *Id.* at 345.

62. *Id.* at 341 (legitimate state interest is "the compensation of individuals for the harm inflicted on them by defamatory falsehood").

63. *Id.* at 344.

64. *Id.*

65. *Id.* at 345.

66. *Id.* at 344 (public figure, like public official, "must accept certain necessary consequences of [his] involvement in public affairs" and "runs the risk of closer public scrutiny").

67. *Id.* at 345.

68. *Id.*

69. *Id.*

70. *Id.* at 346.

The Court's analysis of the state's legitimate interest in protecting individual reputation did not undertake to define precisely the "harm inflicted"[71] on individuals by "defamatory falsehood."[72] Although *Gertz* did reemphasize that "[t]he right of a man to the protection of his own reputation"[73] springs from " 'our basic concept of the essential dignity and worth of every human being,' "[74] it did not offer a detailed analysis of the state interest in providing a remedy for the intrusion on individual rights caused by defamation. This contrasts with the Court's relatively precise articulation of the countervailing First Amendment interests.[75] The *Gertz* analysis did provide, however, a determination of situations in which the state interest diminishes to a point where there is less need to inhibit First Amendment activity through defamation laws.

II. The Public Figure Standard: Reputation and the Press

The *Gertz* public figure standard attempts to reconcile a fluctuating level of state interest in individual reputation with the mandate of the First Amendment. Although the Court ostensibly adopted the Harlan premise for constructing a public figure category, it failed to seize upon Justice Harlan's most significant insight: the constancy of the First Amendment interest in defamation cases. The remainder of this Note will examine this First Amendment interest, analyze

71. *Id.* at 341. For previous attempts to characterize the individual privacy interests at stake, see Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971) (plurality opinion of Brennan, J.); Curtis Publishing Co. v. Butts, 388 U.S. 130, 135 (1967) (plurality opinion of Harlan, J.); Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 63-64 (1966).

72. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). One commentator has acknowledged that the tort of defamation "has usually been defined very broadly as to encompass any kind of statement that would adversely affect or discredit a person in the estimation of reasonable people generally." Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1232 (1976). For an example of scholarly disagreement as to the interests involved in the underlying value of privacy, compare Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326, 329 (1966) ("One may perhaps wonder if the tort is not an anachronism, a nineteenth century response to the mass press which is hardly in keeping with the more robust tastes or mores of today.") (footnote omitted) with Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964) ("The injury is to our individuality, to our dignity as individuals, and the legal remedy represents a social vindication of the human spirit thus threatened rather than a recompense for loss suffered.")

73. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

74. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

75. It appears that the individual interest in reputation is inherently difficult to define precisely. *See* note 71 *supra; cf.* Freund, *Privacy: One Concept or Many*, in PRIVACY 182, 192-93 (NOMOS XIII J. Pennock & J. Chapman eds. 1971) (privacy concept fosters "imprecise analysis of legal issues").

the failure of the *Gertz* public figure standard to protect it, and propose an alternative standard designed to accommodate more effectively competing First Amendment and state interests in the law of defamation.

A. *Recognition of the Selection and Packaging Function*

The *Gertz* opinion demonstrates the Court's concern that defamation liability rules may interfere with press exercise of editorial discretion.[76] This editorial function has been recognized as a vital process that is protected by the First Amendment.[77] In *Miami Herald Publishing Co. v. Tornillo*,[78] decided on the same day as *Gertz*, the Court held that a state statute granting persons criticized in the press a right to reply violated the First Amendment. The Court determined that "the choice of material to go into a newspaper and the decisions made as to . . . content and treatment of public issues constitutes the exercise of editorial control and judgment"[79] and that the First Amendment forbids interference with this editorial process.

The relevance of editorial discretion to defamation law can be demonstrated by a more detailed analysis of the important First Amendment interest in what might be described as the *selection and packaging function* of the institutional press. The selection and packaging function is the process by which the press selects certain facts from all available information and packages them for dissemination to the public.[80] In addition to selection and exclusion of data, the function includes determination of which selected information will be presented prominently and which will be "buried" within a publication, a page, or an article.[81]

76. *See* pp. 1737-38 *infra*.

77. *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (dictum) ("[W]e reaffirm unequivocally the protection afforded to editorial judgment."); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 124 (1973) ("For better or worse, editing is what editors are for, and editing is selection and choice of material."); Herbert v. Lando, 568 F.2d 974, 975 (2d Cir. 1977), *cert. granted*, 98 S. Ct. 1483 (1978) (No. 77-1105) ("[T]he First Amendment requires that we afford a privilege to . . . a journalist's exercise of editorial control and judgment.")

78. 418 U.S. 241 (1974).

79. *Id.* at 258. Surprisingly, the *Gertz* majority does not discuss *Miami Herald*. The only consideration of the case's relevance appears in a brief footnote in Justice White's dissent, Gertz v. Robert Welch, Inc., 418 U.S. 323, 401 n.43 (1974), and in a reference to that footnote in the majority opinion. *Id.* at 347 n.10.

80. A newspaper, for example, has been defined as "the result of a whole series of selections as to what items shall be printed, in what position they shall be printed, how much space each shall occupy, what emphasis each shall have." W. LIPPMANN, PUBLIC OPINION 354 (1922).

81. Selection and packaging decisions are implicit in the daily assignment of reporters, the structure of an individual story, the design of a specific page, and the distribution of information among pages. "Newsmen traditionally arrange the information in news

Press exercise of the selection and packaging function is integral to the First Amendment interests articulated in *New York Times* because it assists the individual in his attempt to make informed choices. It does so by relieving the citizen of the time-consuming task of sifting through all available data, maximizing the interest of disseminated material, making important links between political and more general information, and attempting to circumvent internalized mechanisms that often prevent an individual from exposing himself to new information.[82] By including both political and nonpolitical data in the information package, the press increases the probability that the individual citizen will use such information in making political choices.[83] The press is able to achieve these results by basing selection and packaging decisions on the subtle interplay of the probable interest of the audience,[84] the timeliness of the issue or

stories in an 'inverted pyramid' style, the most newsworthy bits first, followed in descending order by details of lesser significance." In addition, there is the "lead" or first paragraph of a story, designed to "arrest . . . attention" and to give the "busy reader" the most salient information "without forcing him to wade through columns of print." L. SIGAL, REPORTERS AND OFFICIALS 73 (1973).

Although this Note focuses on the print medium, the selection and packaging function is exercised by electronic as well as print journalists. There are, nevertheless, differences inherent in the technology, economics and regulation of each medium that affect the manner in which the selection and packaging function is exercised. *See generally* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

82. *See* Herbert v. Lando, 568 F.2d 974, 978 (2d Cir. 1977), *cert. granted*, 98 S. Ct. 1483 (1978) (No. 77-1105) ("The media is not a conduit which receives information and, senselessly, spews it forth. The active exercise of human judgment must transform the raw data of reportage into a finished product."); Mayo, *The Free Forum*, 22 GEO. WASH. L. REV. 387, 393 (1954) (journalists are "[s]pecialists in the collection and processing of news and specialists in the interpretation of facts as related to the contextual pattern from which they arise") [hereinafter cited as *Free Forum*]. For discussion of internalized barriers to information reception, see generally J. BEST, PUBLIC OPINION 34-45 (1973); L. MILBRATH, POLITICAL PARTICIPATION 35-46 (1972); Mayo, *The Limited Forum*, 22 GEO. WASH. L. REV. 261, 284-92 (1954) (social and psychological phenomena contribute to tendency to avoid exposure to politically relevant information).

83. *See Free Forum*, *supra* note 82, at 410 n.54 (press selects and packages information "apportioned between sufficient reader or listener interest items to attract and hold an audience and those items which are of less exciting nature" but of direct political import). This analysis places a premium on the *effective* dissemination of information. *See* Mayo, *The Limited Forum*, *supra* note 82, at 279 ("[T]he efficiency of communications . . . must be measured, not in terms of the volume of facts disseminated, but by the degree to which such communication facilitates rational [judgments by citizens].")

84. *See Free Forum*, *supra* note 82, at 410.

It has been claimed that capitalism, with its stress on profit maximization, has led the press to overemphasize the audience interest criterion in making selection and packaging decisions. *See, e.g.*, THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 55-57 (1947). Although "in times of financial stringency . . . constraints on resources impinge most noticeably on newsmen," L. SIGAL, *supra* note 81, at 10, in most circumstances major press outlets "relegate profitability to the place of ultimate—and remote—test of success or failure. So long as revenues are sufficient to ensure organizational survival, professional and social objectives take precedence over profits." *Id.* at 8.

event,[85] and the potential consequences of the issue's resolution to the relevant community.[86]

The *Gertz* majority, in restricting the *Rosenbloom* public interest standard, suggested that the *Rosenbloom* test effectively required courts to interfere with exercise of the selection and packaging function. The Court stated that the press, not the "conscience of judges,"[87] must determine " 'what information is relevant to self-government' "[88]

In fact, financial incentives serve to facilitate potential information reception. By making the information package sufficiently attractive for people to "buy" it, the audience interest criterion increases the likelihood that citizens will be exposed to and read politically relevant information.

85. *See Free Forum, supra* note 82, at 403-04 (timeliness criterion "pertains to the most propitious moment for the presentation of specific issues so as to maximize the gainful impact of the discussion").

86. These selection and packaging criteria have been institutionalized by the press in the form of journalistic "conventions." Perhaps the most pervasive of these is that of "objective reporting." F. SIEBERT, T. PETERSON & W. SCHRAMM, FOUR THEORIES OF THE PRESS 60 (1956). Another is " 'balance'—making news columns accessible to various sides in a political controversy." L. SIGAL, *supra* note 81, at 68. Thus the press has developed a system for choosing from among available information that which accurately reflects all facets of a particular event or controversy, and for presenting that information in a manner that indicates the comparative weight of conflicting positions. Even in editorial pages, there is an effort by the press to achieve a balance among various viewpoints. *Id.*

87. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

88. *Id.* This phrase is borrowed from Justice Marshall's *Rosenbloom* dissent, which dealt with the question at some length:

> In order for a particular defamation to come within the privilege there must be a determination that the event was of legitimate public interest. . . . But assuming that . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J., dissenting) (citation omitted); *cf.* Herbert v. Lando, 568 F.2d 974, 980 (2d Cir. 1977), *cert. granted*, 98 S. Ct. 1483 (1978) (No. 77-1105) (claiming that "*ratio decidendi* for *Sullivan*'s restraints on libel suits is the concern that the exercise of editorial judgment would be chilled"); Eaton, *The American Law of Defamation Though* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1415 n.264 (1975) (claiming Court failed to make clear its premise that "the news media ought not to be put to the task of assessing whether a court would ultimately find its news report to be in the public interest"). Justice Brennan, although conceding that judicial determinations of the public interest in an event "would not always be easy," argued in his *Gertz* dissent that "surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty." 418 U.S. at 369.

Lower court decisions have echoed the *Gertz* criticism of *Rosenbloom*. *See, e.g.*, Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 536 n.6, 543 P.2d 1356, 1366 n.6 (1975). The suggestion that the vagueness of the *Rosenbloom* rule inhibits the press has been dismissed because "[p]ractically speaking . . . there is little indication that courts are prone to restrict what the media may publish." Note, *The Expanding Constitutional Protection of the News Media From Liability for Defamation: Predictability and the New Synthesis*, 70 MICH. L. REV. 1547, 1572 (1972). The several cases decided under *Rosenbloom* that found published information *not* to be of "public concern" cast doubt on this view. *See* note 98 *infra* (citing cases).

and worthy of publication. Thus the Court appears to have endorsed the view that there is a constant First Amendment interest in the selection and packaging function, an interest that does not fluctuate with judicial determination of the importance of particular information. Unfortunately, *Gertz* did not explain more fully why interference with the selection and packaging function in defamation cases may violate the First Amendment.[89] The scant attention paid in *Gertz* to defining this First Amendment interest explains the Court's failure to realize that its own public figure standard creates equally serious threats to selection and packaging. Examination of the way in which *Gertz* interferes with selection and packaging, and of the degree to which such interference is unnecessary, demonstrates the need for revision of the public figure standard.

B. *Interference with the Selection and Packaging Function*

The *Gertz* public figure standard, like the Harlan, Warren, and *Rosenbloom* approaches before it, interferes to an unnecessary extent with press exercise of the selection and packaging function: it requires both judicial inquiries beyond the competence of courts and subjective determinations based on the content of published information. Moreover, the *Gertz* standard invites the press to defer mechanically to prior judicial decisions when deciding what information to publish, and it is so vague that the press is unable to predict its application in particular fact situations.

Although *Gertz* purports to reject the *Rosenbloom* requirement that courts ascertain whether published information is of "public interest" before it receives First Amendment protection, the decision actually requires similar judicial inquiries in the application of its public figure standard. By adopting a standard that combines both the Harlan and Warren alternatives, *Gertz* sanctions interference with the selection and packaging function almost identical to that caused by *Rosenbloom*. The Harlan public figure definition, as adopted in *Gertz*, re-

89. The editorial functions of the press are often subsumed in judicial discussion of other, more visible press activity. An example of more "obvious" press activity that has received judicial recognition and protection is the process by which the press actively seeks out and collects information for publication. *Compare* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (prior restraint cannot prevent publication of stolen documents procured by press) *and* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (dictum) ("Without some protection for seeking out the news, freedom of the press could be eviscerated.") *with* Pell v. Procunier, 417 U.S. 817, 834 (1974) (press not entitled to "special access to information not shared by members of the public generally"). *See generally* Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971); Note, *The Right of the Public and Press to Gather Information*, 87 HARV. L. REV. 1505 (1974).

quires courts to determine whether particular information concerns a legitimate "public controversy."[90] The Warren public figure definition, at least as lower courts have interpreted *Gertz,* requires judicial decisions as to the newsworthiness of each individual plaintiff.[91] In both instances courts must evaluate the content of published material and determine whether it is the kind of information the public needs to know.[92]

1. *Limitations on Judicial Scrutiny*

The judicial content determinations required under *Gertz* are beyond the institutional competence of courts and are better left to professional journalists trained in selecting and packaging information for publication.[93] Journalists evaluate all available information in con-

90. *See* p. 1733 *supra.* There is little doubt that the *Gertz* public figure standard is "a *Rosenbloom* question masquerading in a *Butts* disguise." Eaton, *supra* note 88, at 1425. Although " '[p]articipation in a public controversy' is not exactly a twin-sister of *Rosenbloom's* 'involvement in a matter of public concern,' " the two standards are "close enough to be first cousins." *Id.* at 1423. This family resemblance has been recognized by the courts. *See, e.g.,* Wolston v. Reader's Digest Ass'n, 429 F. Supp. 167, 175 n.27 (D.D.C. 1977) ("In *Gertz,* the Court sought to relieve courts of the responsibility for determining the public interest in the context of libel suits, but nonetheless referred to a 'public figure' as an individual who involves himself in a *'public controversy.'* ") (emphasis in original). In fact, some lower courts have interpreted *Gertz* as calling for a *Rosenbloom*-like determination of "public interest" as a necessary condition precedent to *any* individual being termed a public figure. *See* Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1333 (W.D. Pa. 1974); Korbar v. Hite, 43 Ill. App. 3d 636, 641, 357 N.E.2d 135, 138-39 (1976).

91. *See* p. 1733 *supra* & note 99 *infra* (citing cases).

92. It should be emphasized that any defamation liability rule will interfere with the selection and packaging function to some extent. Since the criteria on which selection and packaging decisions are made operate so as to maximize the effective transmission of information, the introduction by the legal system of other criteria, designed to minimize injury to reputation, is certain to diminish the effectiveness of the resulting information package. *But see* pp. 1750-51 *infra* (liability rule minimizes interference with selection and packaging function).

An alternative standard not requiring judicial content evaluation would declare the plaintiff a public figure whenever he has received substantial prior press coverage. *See* note 109 *infra* (citing cases). Application of this standard would substantially chill press exercise of the selection and packaging function in all cases involving an individual's initial attraction of press attention. In addition, such a standard does not recognize that some individuals subject to media scrutiny may be entitled to state protection. For these reasons, a prior press coverage standard fails to balance the competing interests adequately.

93. *See* National Broadcasting Co. v. FCC, 516 F.2d 1101, 1113, *vacated,* 516 F.2d 1180 (D.C. Cir. 1974), *cert. denied,* 424 U.S. 910 (1976) ("Choices have to be made and, assuming that the area is one of protected expression, the choices must be made by those whose mission it is to inform, not by those who must rule.") There is ample evidence that "[j]ournalism is a profession no less than the law," which involves "knowledge and experience not normally available to the populace at large." Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power,* 54 TEX. L. REV. 271, 277 n.21 (1976). This professionalism has reflected itself in an ethic of social respon-

structing the publication package that is ultimately disseminated[94] and explicitly balance political information with other material designed to attract readers and to hold their attention.[95] Courts are not trained or experienced in the task of editing a newspaper.[96] Yet the *Gertz* standard requires courts to examine a discrete piece of information and to make an isolated judgment about its First Amendment value. The judiciary as an institution is not competent to determine whether, as part of a comprehensive information package, an individual piece of information will serve the First Amendment interest in rational decisionmaking by citizens.[97] Furthermore, as the cases following *Rosenbloom*[98] and *Gertz*[99] illustrate, unfortunate results often flow from

sibility for providing relevant and effectively presented information to the citizenry. F. SIEBERT, T. PETERSON & W. SCHRAMM, *supra* note 86, at 74; *Free Forum, supra* note 82, at 393.

94. *See* p. 1735 *supra.*

95. A failure to recognize the dynamics of selection and packaging appears to be a major flaw of the so-called "public speech" theory of the First Amendment that expressly "requires distinguishing between events the knowledge of which contribute to the formation of public opinion necessary to effective self-government" and those that do not. D. Meiklejohn, *Public Speech in the Supreme Court Since* New York Times v. Sullivan, 26 SYRACUSE L. REV. 819, 827 (1975); *see* Wright, *Defamation, Privacy and the Public's Right to Know: A National Problem and a New Approach,* 46 TEX. L. REV. 630, 636 (1968) (advocating similar judicial determinations).

96. *See* National Broadcasting Co. v. FCC, 516 F.2d 1101, 1153, *vacated,* 516 F.2d 1180 (D.C. Cir. 1974), *cert. denied,* 424 U.S. 910 (1976) (Leventhal, J., concurring) (claiming "[j]ournalists may be stifled if they are steered from the way in which their profession looks at things, and channeled to another way, which however [congenial] to men of the law" is foreign to those whose profession it is to communicate).

97. *See* Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact,* 16 STAN. L. REV. 107, 113 (1963) (even press appears unable to agree on objective definition of "newsworthy").

Attempts by the Federal Communications Commission to assess the fairness of news and public affairs broadcasts may also suffer from a lack of institutional competence. *See, e.g.,* Healey v. FCC, 460 F.2d 917, 922-23 (D.C. Cir. 1972) (FCC decision that Communism does not constitute controversial issue); Dr. Benjamin Spock Peoples Party, 38 F.C.C.2d 316, 318 (1972) (opinions of fringe party political candidates not of public importance); J.F. Branigan, 31 F.C.C.2d 490, 491 (1971) (discussion of international affairs not directly involving United States not controversial). For discussion of First Amendment problems of FCC content review, see generally B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS (1976); Bazelon, *FCC Regulation of the Telecommunications Press,* 1975 DUKE L. REV. 213.

98. *Compare* Twenty-Five East 40th St. Corp. v. Forbes, Inc., 30 N.Y.2d 595, 282 N.E.2d 118, 331 N.Y.S.2d 29 (1972) (quality of restaurant food is matter of public interest) *with* Old Dominion Branch No. 496 v. Austin, 213 Va. 377, 383-84, 192 S.E.2d 737, 742-43, *rev'd,* 418 U.S. 264 (1974) (refusal of workers to join labor union not matter of public interest). For a detailed compilation of lower court cases decided under the public interest standard and their results, see Justice White's dissent in Gertz v. Robert Welch, Inc., 418 U.S. 323, 377 n.10 (1974).

99. Under the *Gertz* "persuasive power" category, compare Atkins v. Friedman, 49 A.D.2d 852, 374 N.Y.S.2d 11 (1975) (author of diet books has achieved pervasive fame), and Carson v. Allied News Co., 529 F.2d 206, 209-10 (7th Cir. 1976) (television star is prominent in society), with Lawlor v. Gallagher President's Report, Inc., 394 F. Supp. 721, 731 (S.D.N.Y. 1975) (corporate executive has achieved no general fame). This result

judicial intervention in the realm of selection and packaging.[100]

Judicial content determinations are necessarily subjective. Under *Gertz* a decision whether a plaintiff is a public figure must be made in order to determine the appropriate standard of liability. Yet the lack of discernible guidelines for decision leads courts to make public figure determinations on the basis of the liability result they desire.[101] Lower courts are left free to weigh their own subjective determination of the "worth" of a particular piece of published information[102] against their evaluation of the merit of an individual defamation claim. Thus the *Gertz* standard requires courts to base First Amendment adjudication on the content of expression.[103] Because of the threat of political abuse, courts have traditionally held that the First Amendment forbids such content-based standards.[104]

is somewhat ironic in view of the fact that Chief Justice Warren predicated erection of the public figure category largely on the concentration of power in the private sector and the need of the public to be informed on the activities of those who wield that power. *See* p. 1730 *supra*.

Under the *Gertz* "public controversy" category, compare General Motors Corp. v. Piskor, 27 Md. App. 95, 112, 340 A.2d 767, 779 (1975) (scuffles between auto workers and plant security guards not public controversy) and Martin v. Griffin Television, Inc., 549 P.2d 85, 89 (Okla. 1976) (condition of animals in privately owned pet shop not public controversy) with Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1046-47 (S.D.N.Y. 1975) (dispute over friendships of Ernest Hemingway public controversy) and Bandelin v. Pietsch, 563 P.2d 395, 398 (Idaho), *cert. denied*, 98 S. Ct. 266 (1977) (management of admittedly obscure decedent's small estate by former political figure is public controversy).

100. In many post-*Gertz* public figure cases cited in this Note, the defendant is not the institutional press. Nonetheless, these decisions under the public figure standard add to the body of judicial precedent that interferes with press exercise of the selection and packaging function.

101. A standard that sought to protect politically relevant information might require that, in order to be protected under the actual malice standard, expression must include discussion of pending legislation. *Cf.* Bork, *supra* note 19, at 20 (arguing that only explicitly political information is protected under First Amendment). Such a standard could be applied neutrally in all like cases and would present no vagueness problem. Nonetheless, such a rule would be unacceptably narrow because it would leave much information of clear political relevance unprotected and would ignore the contribution of the selection and packaging function to political decisionmaking.

102. The often bitter judicial division evident in and among many libel cases generally has its source not in disagreement over legal principles but in application of those principles in assessing the importance of a particular piece of information. *See, e.g.*, Francis v. Lake Charles Am. Press, 262 La. 875, 265 So. 2d 206 (1972) (majority and dissenting opinions disagreed whether bond forfeiture proceeding is matter of public interest). *Compare* Firestone v. Time, Inc., 271 So. 2d 745, 751 (Fla. 1972), *rev'd on other grounds*, 424 U.S. 448 (1976) (divorce not matter of public interest) *with* Firestone v. Time, Inc., 460 F.2d 712, 718 (5th Cir. 1972) (in case involving same divorce, but different publication, opposite conclusion reached).

103. *See* Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43, 55 (1976) (criticizing *Gertz* because "courts simply should not, in a free society, take it upon themselves to determine what is newsworthy").

104. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 208-12 (1975); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its sub-

2. *Chilling Effect on Press Editorial Functions*

Judicial determinations of the merit of particular information under *Gertz* adds to a growing body of precedent defining what information concerns a "public controversy" or discusses individuals of "power and influence." These precedents tend to replace specific editorial decisions by the press in individual cases. Hence the courts and not the press make what become controlling selection and packaging decisions. The chilling effect of potential liability leads the press to defer to these precedents in determining what information to disseminate and how to present it.[105] Journalistic criteria designed to maximize relevance and impact are replaced by rules derived from this expanding body of case law. The libel attorney, who plays a prominent role in many publication decisions,[106] reinforces the significance of these precedents for the press.

The vagueness of standards such as "public controversy" and "persuasive power" exacerbates this chilling effect. *Gertz* failed to define these terms adequately and to provide specific criteria for lower courts to apply in particular cases. The reasoning of individual decisions varies so much that the press has an incentive to avoid potential liability in factual settings even remotely similar to those of prior adjudications.[107] The *Gertz* standard does not alleviate the problems

ject matter, or its content."). Although they are generally less politically motivated, it would appear that courts, as a part of the government, should be limited by the same restrictions. *See* Herbert v. Lando, 568 F.2d 974, 984 (2d Cir. 1977), *cert. granted*, 98 S. Ct. 1483 (1978) (No. 77-1105) (asserting that judicial, as opposed to legislative, interference with editorial function "does not reduce the grave implications for the vitality of the editorial process"). *But see* Young v. American Mini-Theatres, Inc., 427 U.S. 50, 66-70 (1976) (opinion of Stevens, J.) (courts make content distinctions in deciding First Amendment questions involving unprotected utterances such as defamation); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-70 (1976) (Court replaces "commercial speech" doctrine with test that looks to "public interest" of information involved).

105. *See* p. 1732 *supra* (chilling effect).

106. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 438-41 (1975) (prominent role of attorney in press publication decisions).

107. In his concurring opinion in *Rosenbloom*, Justice White claimed he was "not aware" of any instance of the press "tread[ing] too gingerly." Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 60 (1971) (White, J., concurring). *But see* AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580, 588 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976) ("Publishers, fearful of being unable to prove the truth of their statements, would avoid the publication of controversial articles."); Franklin, *supra* note 97, at 142 (potential defamation liability "much more harmful than threats to freedom of action in other areas because it is so easy for the press to skirt 'trouble' by completely avoiding any possibly sensitive area"). For the claim of a lawyer/journalist that the chilling effect is a very real threat to the press, see Anderson, *supra* note 106, at 430.

Awards made by lower courts in cases that have reached the Supreme Court demonstrate that libel judgments may be substantial. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 40 (1971) (Rosenbloom awarded $750,000); Curtis Publishing Co. v. Butts, 388 U.S. 130, 138, 141 (1967) (Butts awarded $460,000 and Walker received $500,000); New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) (Sullivan awarded $500,000).

confronted by courts under *Rosenbloom*.[108] Several post-*Gertz* opinions have complained of the difficulties inherent in making a public figure determination.[109]

Moreover, although *Gertz* claims to fix an appropriate level of legitimate state interest, its adoption of both the Harlan and Warren public figure definitions belies that assertion. Rather than formulating a standard that varies the level of protection afforded individual reputation with the probability of harm,[110] *Gertz* makes protection depend on the influence of the plaintiff or on the degree of controversy inherent in the situation. Any incentive given the press to avoid liability should arise when harm is more probable, not when a court decides information is not sufficiently important to merit publication.

C. Time, Inc. v. Firestone: *The Public Figure Standard Applied*

The failure of *Gertz* to recognize threats to the selection and packaging function that are inherent in its public figure standard is demonstrated by *Time, Inc. v. Firestone*,[111] the Court's most recent libel decision. *Firestone* involved a *Time* magazine report that Mary Alice and Russel Firestone were divorced "on grounds of extreme cruelty and adultery."[112] Although substantial evidence of adultery was introduced at trial, this was not a ground of decision. In Mrs. Firestone's defamation action, the court found *Time* guilty of "journalistic negligence."[113] The Supreme Court upheld the state court in almost all respects but remanded for a more conclusive record to support the finding of fault.[114]

Because the Court found that Mrs. Firestone was not a public figure, *Time* was not protected under the actual malice standard. The Court decided without comment that Mrs. Firestone did not possess the "especial prominence" necessary to make her a public figure under the

108. *See* note 88 *supra* (citing cases).

109. *See, e.g.*, Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976) ("Defining public figures is much like trying to nail a jellyfish to the wall.") For other admissions of judicial frustration, see Anderson v. Stanco Sports Library, Inc., 542 F.2d 638, 640 (4th Cir. 1976); Wolston v. Reader's Digest Ass'n, 429 F. Supp. 167, 172 (D.D.C. 1977); Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1044 (S.D.N.Y. 1975). Not surprisingly, several post-*Gertz* courts have based a public figure determination on the fact of media publicity itself. *See, e.g.*, Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 957 (D.D.C. 1976); Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1333 (W.D. Pa. 1974). *But see* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (media publicity alone not sufficient to create public figure).

110. *See* p. 1733 *supra* (explaining that this is premise of *Gertz* public figure standard).

111. 424 U.S. 448 (1976).

112. The entire story is reprinted in the opinion of the Court. *Id.* at 452.

113. *Id.* at 463.

114. *Id.* at 464.

Warren definition.[115] The majority then determined that the plaintiff's involvement in a divorce proceeding did not constitute involvement in a "public controversy."[116] Although the Firestone divorce was a "cause célèbre,"[117] the Court held that to define public controversy as "all controversies of interest to the public" would "reinstate the doctrine advanced in [*Rosenbloom*]."[118]

This application of the public figure standard illustrates its interference with the selection and packaging function. The Supreme Court analyzed the content of particular information and held it unworthy of First Amendment protection, although it was at least arguable that the activities of a powerful industrialist have some political significance. The particular information published might also have been relevant to more general political debate concerning divorce or deterioration of the family unit. In addition, the majority acknowledged that the information involved was of some public interest. *Time* may have made a selection and packaging decision that this information was likely to attract readers to the magazine as part of an information package that would effectively present information,[119] including material of direct political significance.[120]

Nevertheless, the press is now aware of a determination by the Supreme Court that the divorce of a wealthy and powerful individual

115. *Id.* at 453. *Firestone* did not address the question of how the *Gertz* standard is to be applied when two individuals are involved in a press report, one of whom is a public figure. It is likely that Mr. Firestone qualifies as a public figure under the persuasive power category. The Warren rationale for that category, see p. 1730 *supra*, suggests that when such an individual is involved the public is entitled to press dissemination of information concerning him regardless of who brings the defamation action. In *Firestone*, however, the Court held that because Mrs. Firestone was not a public figure in her own right, the press was not privileged to report information concerning her husband. *See* note 147 *infra* (treatment of such multiple participant reports under proposed standard).

116. Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976).

117. *Id.*

118. *Id.*

119. *See* pp. 1736-37 *supra* (importance of audience attraction criterion to selection and packaging function). To point out that information that attracts readers facilitates potential reception of more politically relevant information is not to suggest that information is protected speech simply because it attracts an audience. In fact, the premise of this analysis is that the information is defamatory and thus not itself protected by the First Amendment. The point is that publication of such information is integral to press exercise of the selection and packaging function, an activity that is entitled to a measure of First Amendment protection.

120. *See* pp. 1736-37 *supra* (selection and packaging function may involve publication of both political and nonpolitical information). For example, the issue of *Time* that contained the report of the Firestone divorce also included extensive information on the Vietnam War, discussion of President Johnson's re-election prospects, and an appraisal of the performance of the just-concluded 90th Congress. TIME, Dec. 22, 1967, at 15-18.

is not a public controversy.[121] Because of the threat of large damage awards now inherent in publication of similar stories,[122] the press will have an incentive to apply this precedent mechanically to override a selection and packaging decision. Because of the vagueness of the public controversy standard the press will hesitate to publish items dealing with related topics, such as the extra-marital affairs and social ties of powerful individuals, whether or not a judicial resolution would ultimately favor the press.[123]

III. Tort Principles and Public Figures: An Alternative Standard

Recognition of the selection and packaging function highlights the substantial and constant First Amendment interest present in all defamation cases. Although Harlan's approach suggested that such a constant interest exists, his requirement of a judicially determined "public controversy" would imply that the interest may vary from case to case. Similarly, although *Gertz* found that *Rosenbloom* varied impermissibly the magnitude of the First Amendment interest according to the content of published information, the *Gertz* standard varies that interest with both the extent of controversy inherent in published information and the status of the plaintiff.[124] This Note contends that a public figure standard designed to accommodate the First Amendment and the competing state interest in reputation must recognize that the First Amendment interest in press exercise of the selection and packaging function does not fluctuate. The *Gertz* opinion also indicates that such a standard must determine an appropriate

121. *But see* Time, Inc. v. Firestone, 424 U.S. 448, 488 (1976) (Marshall, J., dissenting) (asserting *Gertz* had rejected "appropriateness of judicial inquiry into 'the legitimacy of interest in a particular event or subject' ") (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78-79 (1971) (Marshall, J., dissenting)).

122. *Firestone* indicates that the public figure standard is not the only component of the *Gertz* liability rule that interferes with protected press activity. *Gertz* claimed to lessen the chilling effect of large damage awards by forbidding punitive or presumed damages absent a showing of actual malice and by limiting ordinary damages to compensation for actual injury. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). However, by permitting Mrs. Firestone to recover $100,000 for mental suffering, the Court bypassed its own protective rules. *See* Time, Inc. v. Firestone, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting) (award "subverted whatever protective influence the 'actual injury' stricture may possess").

123. Although several large press outlets have consistently invested large sums in litigating First Amendment questions, there is evidence that smaller newspapers are prone to tread carefully whenever liability or litigation expenses are conceivable. *Cf.* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 610 n.40 (1976) (Brennan, J., concurring) (discussing impact of prior restraints on small newspapers).

124. *See* pp. 1732-33 *supra* (setting out *Gertz* public figure definitions).

level of legitimate state interest.[125] The public figure standard proposed below, derived from both post-*Gertz* and common law public figure cases, is designed to reflect these concerns.[126]

A. *A Proposed Public Figure Standard*

The proposed standard offers an alternative to the public figure definitions in *Gertz* and complements the remainder of the *Gertz* liability rule.[127] Instead of defining public figures as individuals of "power and influence" or persons who have taken part in a "public controversy," a public figure might be defined as an individual who has access to self-help remedies.[128] Such a general public figure definition would reflect the level of legitimate state interest underlying *Gertz*' adoption of a public figure standard,[129] while eliminating the judicial content determinations required under the *Gertz* standard.[130]

The proposed standard reduces the need for detailed and subjective judicial inquiries into a plaintiff's access to self-help. In addition, this standard creates a set of presumptions that can be applied in all cases without inquiry into the merit of published information and thereby implements the definitional balancing process that *Gertz* undertook in part.[131] Although presumptions necessarily entail some arbitrary

125. This Note does not claim that *Gertz*' estimation of the individual and state interests in defamation is a definitive statement. Justice White, for one, has argued that *Gertz*' abolition of liability without fault and limitation on the size of damage awards abridge those interests to an unwarranted extent. Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974) (White, J., dissenting). Nonetheless, *Gertz* is the most forceful articulation of the state and individual interests offered in any Supreme Court defamation decision, and its reasoning is accepted here as the appropriate level at which to balance them with countervailing First Amendment interests.

126. The proposed public figure standard seeks only to accommodate the competing interests at stake in the law of defamation. It is not contended that the rule should be applied to related tort actions against the press, such as the tort of invasion of privacy. Although many of the considerations involved there may be similar, unique difficulties exist which demand separate treatment.

127. *See* pp. 1731-33 *supra* (setting out *Gertz* liability rule). The proposed standard is not, of course, the only one constitutionally permissible. A state that did not seek to provide maximum protection for individual reputation might eliminate the public figure concept and adopt an actual malice standard in all defamation cases. To be constitutionally acceptable, however, the standard would have to apply to all defamation cases, not only to those involving matters of public concern.

128. The proposed public figure standard is based on the rationale for erecting the category articulated by Justice Harlan in *Butts* and *Hill,* and adopted in *Gertz. See* pp. 1729-30, 1733 *supra.* Unlike the Harlan approach, however, the proposed standard eliminates the requirement of a "public controversy" and creates a set of presumptions about self-help that determine when a plaintiff is a public figure.

129. *See* pp. 1729-30 *supra.*

130. *See* p. 1739 *supra.*

131. In New York Times Co. v. Sullivan, 376 U.S. 254, 267, 284 (1964) the Supreme Court rejected a state law doctrine that presumed legal injury from the fact of publication because it contravened the First Amendment interest. It can be argued that

application in individual cases, those proposed are designed to establish clear categories of press protection and to isolate those individuals entitled to state protection.[132]

Individuals who have access to self-help remedies are those who have realistic access to a roughly equivalent audience to counter the defamation.[133] They thus presumably have the opportunity to mitigate their damages effectively[134] and to reduce their injury substantially. Cases decided under both common law and *Gertz* liability rules suggest that damages can be mitigated effectively in four ways: the publication in question can print a retraction as prominent as the original defamation; the publication can provide the individual with a roughly equivalent opportunity to reply; the individual can make public statements disseminated by the press to a comparable audience

because all presumptions are necessarily overinclusive those proposed here will consistently undervalue the state interest in individual reputation. Unlike those at issue in *New York Times*, however, the presumptions used here do not prevent exercise of constitutional rights; instead, they aid in the protection of a constitutional guarantee. *Cf.* Freund, *William J. Brennan, Jr.*, 86 YALE L.J. 1015, 1017 (1977) ("Procedural though they are, [presumptions] are powerful levers in the enforcement of constitutional guarantees.")

Even though the proposed presumptions are rebuttable, they are necessarily overinclusive to some extent and will encompass individuals who do not suspect that their conduct may prompt media inquiry. Such overinclusiveness is a characteristic of all such presumptions, including the *Gertz* standard. Although *Gertz* presumes that all individuals who take an active role in a "public controversy" have assumed the risk of defamation, there will be situations in which such an individual will be unaware of any potential harm. Moreover, there will be individuals involved in situations courts conclude are not "public controversies" who will in fact have assumed risk.

132. *See* Wolston v. Readers Digest Ass'n, 429 F. Supp. 167, 177 n.33 (D.D.C. 1977) ("[I]nasmuch as the media have no way of ascertaining with certainty—much less of proving—the actual thought processes of a putative public figure but instead must rely on objective indicia of his intentions, . . . the standard must be an objective one").

133. Tort law has long recognized that the availability of self-help remedies will effectively mitigate damages. The ability to mitigate in a particular case does not lead to a verdict for defendant under traditional tort theory but often results in limited or no recovery for plaintiff. *See, e.g.*, Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1966); O'Connor v. Field, 266 A.D. 121, 41 N.Y.S.2d 492 (1943); Webb v. Call Publishing Co., 173 Wis. 45, 180 N.W. 263 (1920). Approximately 30 states have passed statutes that deny a plaintiff punitive damages and occasionally general damages when a retraction has been printed. Stevens, *Defamation of Political Figures: Another Look at the Times-Sullivan Rule*, 27 FED. COM. B.J. 99, 105 (1974).

134. Although the common law has long recognized that a reply mitigates damages, there has been some concern that its effectiveness is overstated. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974) ("[A]n opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood."); Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 U.C.L.A. L. REV. 371, 376 (1970) (similar criticism); *cf.* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 229 (1976) (asserting mitigation doctrine is disincentive to reasonable press conduct). On the other hand, the common law's acceptance of a reply as an effective mitigation device is supported by the First Amendment doctrine that "truth" will emerge from the conflict of competing information. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (First Amendment marketplace of ideas).

that contradict the defamation; or relatively frequent prior access to roughly equivalent media in the relevant community can indicate that future access is probable.[135] Under the proposed standard, a court would determine whether an individual has such access to self-help and, if he does, would presume that he is a public figure.

A court necessarily exercises a measure of discretion in determining whether a retraction is as prominently presented as a defamatory statement or whether a plaintiff's refutation has been disseminated to a comparable audience. Although difficult cases may arise, a press defendant has the power to eliminate uncertainty and to ensure that a plaintiff is a public figure simply by printing a retraction, by offering reply space, or by accurately reporting the contents of a plaintiff's denial. Moreover, the possibility of a defamation action in a particular case gives the press an incentive to publish retractions and replies as prominently as the original defamation.[136] Courts should also find access to self-help when a rebuttal is printed or broadcast by a media outlet with a roughly similar audience in the distribution area of the media defendant.[137]

The proposed standard does not necessarily include in the public figure category all individuals who "invite attention and comment"[138] or otherwise assume the risk of defamation. Although this premise of the Harlan approach in *Butts*[139] was adopted by the *Gertz* majority,[140]

135. These presumptions are drawn from both common law precedents, where the applicability of these circumstances was pleaded in an attempt to mitigate damages, *see* note 133 *supra* (citing cases), and from similar experience under *Gertz* leading to an individual being declared a public figure. *See, e.g.*, Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 957 (D.D.C. 1976) (corporation public figure because it was in constant process of issuing press releases); Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1047 (S.D.N.Y. 1975) (author had ample access to mass media); Buchanan v. Associated Press, 398 F. Supp. 1196, 1203 n.1 (D.D.C. 1975) (plaintiff public figure because he successfully sought timely retractions); Adams v. Frontier Broadcasting Co., 555 P.2d 556, 562 (Wyo. 1976) (persons involved in broadcast rebutted charges made by anonymous caller).

136. The ability of a news organization to print a retraction or to offer reply space should not be equated with a right to reply for defamation plaintiffs. Such a statutory right was in fact suggested by the *Rosenbloom* plurality. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47 (1971) (Brennan, J.). However, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974), held that a mandatory right to reply is unconstitutional. Although the proposed standard gives the press an incentive to offer a reply when it fears the greater injury of a large damage award, the press is not penalized for refusing to do so when its article is not in fact defamatory.

137. Similarly, courts should not require that retractions or replies be published on the same page or cover the same number of column inches as the original statement. Rather, a retraction or reply should be sufficient whenever it is reasonably likely to be seen by a roughly comparable audience.

138. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

139. *See* p. 1730 *supra*.

140. *See* p. 1733 *supra*.

the tort concept of assumption of risk is so amorphous that it is impossible to define explicitly those situations in which an individual assumes the risk of defamation.[141] Moreover, judicial inquiry into assumption of risk gives courts an incentive to determine whether a plaintiff has taken part in a public controversy because defamation plaintiffs are likely to know that such situations might be the subject of press scrutiny.[142] A public figure category based on assumption of risk would, therefore, lead to interference with the selection and packaging function.[143] Such interference is unnecessary because the press can assure a plaintiff's public figure status by providing him with access to self-help remedies.

A court should rule on whether a plaintiff is a public figure before the trier of fact determines fault.[144] If the individual is a public figure, the standard of liability is actual malice.[145] Thus, the court would

141. The Harlan rationale for constructing a public figure category has been criticized as "balancing . . . run riot." Kalven, *supra* note 33, at 301; *see id.* at 299 ("The cardinal difficulty [with Harlan approach] is that it appears to lack constitutional dimensions. It makes at a constitutional level more discriminations than two centuries of tort law has [*sic*] worked out at the common-law level!")

There is relatively little clear judicial explanation of the assumption of risk concept. *See* Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 123 (1961) (assumption of risk "a phrase of art" which is "inadequate for signifying grounds of decision because of uncertainty about its meaning"); Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 14 (1961) (assumption of risk concept "very confusing" and "used to beg the real question"). The cases exemplify this confusion. *See, e.g.*, Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959) (assumption of risk defense partially abolished in New Jersey because often confused with other tort concepts); W. PROSSER, *supra* note 23, § 68, at 439 (4th ed. 1971) (assumption of risk often synonymous with concepts of "no duty" and "contributory negligence"). Moreover, unlike the standard proposed here, traditional tort notions of assumption of risk almost always involve a factual inquiry into the subjective knowledge and voluntary state of mind of each plaintiff, *see id.* at 447; Green, *Assumed Risk as a Defense*, 22 LA. L. REV. 77, 78 (1961), an inquiry too uncertain for First Amendment purposes.

142. *See* pp. 1730, 1733 *supra* (both Harlan approach and *Gertz* standard equate involvement in public controversy with assumption of risk).

143. *See* pp. 1739-43 *supra* ("public controversy" standard interferes with selection and packaging function).

144. This has been the practice of all courts that have made public figure determinations since *Gertz*. *See, e.g.*, Rosanova v. Playboy Enterprises, Inc., 411 F. Supp. 440, 444 (S.D. Ga. 1976); Hotchner v. Castillo-Puche, 404 F. Supp. 1041, 1045 (S.D.N.Y. 1975).

As under traditional tort procedure, if a plaintiff is found not to be a public figure, common law notions of self-help and assumption of risk can still be introduced later in a proceeding as either an indication of mitigation of damages or an affirmative defense to a finding of fault.

145. The *New York Times* public official category comports with this analysis. It is not claimed that information concerning public officials is protected more than other information disseminated by the press. Nonetheless, in cases involving defamation of public officials, the state interest is greatly reduced because the public official, over the run of cases, has ready access to self-help remedies. The act of acceptance of public office is an objective standard which can be applied in all like cases. This reduced level of state interest was recognized by the *Gertz* majority. 418 U.S. at 344; *accord*, Pickering v. Board of Education, 391 U.S. 563, 572 (1968).

decide which category is applicable to the particular plaintiff and then apply the appropriate standard. Although the first step involves an assessment of the facts of the case, it does not, because of the objective presumptions supplied by the proposed standard, involve unchecked judicial balancing. The second step simply requires application of a standard already determined through definitional balancing. An application of this standard indicates that the Court's disposition of *Firestone* may be incorrect. In *Firestone* the plaintiff had held prior news conferences, which were widely reported.[146] This raises a presumption that she had access to self-help remedies. Mrs. Firestone would therefore be deemed a public figure and would recover only upon a finding of actual malice.[147] Such a result in *Firestone* and other similar cases would represent a more desirable accommodation of the competing interests than the result under *Gertz*.

B. *The Competing Interests Under the Proposed Standard*

By substituting the proposed public figure standard for the *Gertz* standard, the resulting liability rule would reduce the number of plaintiffs entitled to recover from the press absent actual malice while minimizing interference with the press's exercise of its selection and packaging function. Rather than requiring judicial inquiry into the existence of a "public controversy" or into possession by individuals of "persuasive power," a series of content-neutral criteria are presumed to establish such conclusions. The court would direct its attention to the needs of individual plaintiffs and not to the content of press publication. Moreover, the press could rely on these presumptions whenever the individual's circumstances satisfy these criteria, and it could make selection and packaging decisions on the basis of criteria that facilitate informed choice.

It might be argued that the press will be penalized for its exercise of the selection and packaging function when an individual who does not fall within these presumptions brings a defamation action. Unlike the *Gertz* alternative, however, the proposed standard would not result in a body of judicial precedent detailing what information the press can safely publish based on its content. Furthermore, the proposed standard avoids the vagueness of the "public controversy" and

146. Time, Inc. v. Firestone, 424 U.S. 448, 454-55 n.3 (1976).

147. If Mrs. Firestone had *not* been a public figure under the proposed standard, the fact that her husband might have been a public figure would not affect her ability to recover. Since the proposed standard presumes that the First Amendment interest is constant in all defamation cases, and that the standard of liability fluctuates with the need of each plaintiff for state protection, the status of other individuals is irrelevant.

"persuasive power" categories. Although any liability rule designed to accommodate other interests will interfere with the selection and packaging function to some extent,[148] the proposed standard limits the instances in which the press will hesitate to publish. The press must be on guard only when it is uncertain whether a plaintiff falls within the articulated presumptions and not when a court has determined that the content of a press publication is without merit. Moreover, the press can ensure that a plaintiff is deemed a public figure simply by printing a retraction, by offering reply space, or by reporting a denial.

The press might be inhibited from publishing certain information only when vindication of what *Gertz* identified as the legitimate state interest in individual reputation requires that result; that is, where private citizens who have no access to self-help are defamed. Admittedly, identification of this legitimate state interest suffers from the vagueness inherent in the concepts underlying individual reputation.[149] Nevertheless, the proposed standard accords with the *Gertz* determination of who is most worthy of protection and builds increased protection for those individuals into the liability rule itself. An individual who has no opportunity to mitigate his hurt through self-help remedies is "not only more vulnerable to injury"[150] but is also "more deserving of recovery."[151] These individuals receive protection identical to that afforded by *Gertz* but under a standard that, unlike *Gertz,* limits interference with protected press activity.

148. *See* note 92 *supra.*
149. *See* note 75 *supra.*
150. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).
151. *Id.* A perplexing problem is the question of defamation actions brought by corporations. It is arguable that because a corporation's claim to relief in these cases "does not involve 'the essential dignity and worth of every human being'" it should be denied a cause of action for defamation. *See* Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 955 (D.D.C. 1976). Although this resolution seems appropriate, post-*Gertz* courts appear to be applying a public figure analysis to actions brought by corporations. *Id.;* Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 820-21 (N.D. Cal. 1977). The Court in *Martin Marietta,* however, rested its decision on a determination that *Rosenbloom* applied. 417 F. Supp. at 956. Under the proposed standard, most corporations would probably be declared public figures under one of the articulated presumptions. The Martin Marietta Corporation, for example, would be a public figure because of concentrated public relations efforts involving almost constant mailings of press releases. *Id.* at 957.